U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 06 September 2007

CASE NO.: 2007-LDA-00091

OWCP NO.: 02-143094

IN THE MATTER OF

V.G.,
Claimant

v.

SERVICE EMPLOYERS INTERNATIONAL, INC.,
Employer

INSURANCE CO. OF THE STATE OF PENN,
c/o Amer. Int'l Underwriters,
Carrier

APPEARANCES:

Lewis Fleishman, Esq.,
On behalf of Claimant

Jerry R. McKenney, Esq.,
James Azzarello, Esq.,
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER GRANTING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq*., (2000) and its extension, the

Defense Base Act, (DBA), 42 U.S.C. 1651 *et seq*. brought by V.G. (Claimant), against Kellogg, Brown, & Root/SEII (Employer), and Insurance Co. of the State of Pennsylvania, c/o American International Underwriters (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before the undersigned on April 26, 2007 in Houston, Texas.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced 51 exhibits which were admitted, including various DOL forms; Employer's discovery responses; Claimant's job description, contract of employment, personnel file, earnings statement, average weekly wage calculation, IRS records; Section 7 demands; billing statements; medical records from Landsthul Regional Medical Center, Drs. Lubor Jarolimek, Kevin Varner, Ronald Konig, Bruce Weiner, Michael Kaldis, and Emmanuel G. Melissimos; job classification and medical payments; medical report from Michael Morris.[1] Employer introduced 25 exhibits which were admitted; including Claimant's wage data, pre-deployment physical and personnel file; medical records from Landstuhl Regional Medical Center, Vista Medical Center, Methodist Hospital, San Jacinto Aquatic Therapy, Advanced Diagnostics, Kelly Home Care; medical records from Drs. Jarolimek, Kaldis, Melissinos, Weiner; various DOL forms, rehabilitation assessment of Wallace A. Stanfill; Claimant's discovery responses.

On July 4, 2007, Employer sought to introduce EX-26, medical reports of October 19 and 23, 2006, by Dr. Omer A. Ilahi; EX-27, 2007, a supplemental FCE report of therapist Kate Hughes dated February 26, 2007, and EX-28, a supplemental report of Dr. Varner dated April 2, and May 27, 2007. Employer submitted that the additional exhibits were needed to fully evaluate Claimant's injuries. On July 6, 2007 Claimant filed a motion to strike said exhibits as untimely and an attempt to obtain an unfair strategic advantage. Claimant correctly notes that the record was left open at the conclusion of the hearing for only the submission of a medical evaluation of Claimant's TMJ condition. (Tr. 21, 22, 76). I agree with Claimant that to allow the additional exhibits at this time would grant Employer an unfair technical advantage and would serve only to delay the proceedings even further by the post-trial submissions of depositions by Claimant in response to these new exhibits. Accordingly I grant Claimant's

[1] References to the transcript and exhibits are as follows: trial transcript- Tr.___; Claimant's exhibits- CX-___, p.___; Employer exhibits- EX-___, p.___.

motion to strike said exhibits as untimely and likely to result in substantial and unnecessary delays.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. Claimant was injured on July 11, 2005 in the course and scope of his employment as an employee of Employer.

2. Employer was advised of Claimant's injury on July 11, 2005.

3. Employer filed notices of controversion on August 23, 2006; January 9, 2007, and January 18, 2007.

4. An informal conference was held on December 29, 2006.

II. ISSUES

1. Whether Claimant sustained a temporomandibular joint (TMJ) injury on July 11, 2005.

2. Whether Claimant is temporarily totally disabled (TTD) from his July 11, 2005 injury.

3. Claimant's average weekly wage.

4. Section 7 medicals.

III. STATEMENT OF THE CASE

A. Claimant's Testimony

Claimant, who speaks minimal English, testified with the assistance of a translator. Claimant is a 26 year old male, U.S. citizen with a formal, high school, Mexican education. (Tr. 25, 26). Claimant came to the U.S. in 1999 where prior to his employment with Employer he worked as a painter, painter's helper, laborer and scaffold builder at chemical plants and refineries. In 2003, Employer hired Claimant to erect scaffolds and paid him a total of $26,582.00. (Tr. 29, CX-3, p. 39, CX-14). In 2004, Claimant quit his job with Employer jobs in order to study English and worked only from January to April for JB Industrial making $3,733.00 after which he was unable to find employment despite a diligent search. On January 26, 2005 Employer hired Claimant to work as a laborer in Kandahar, Afghanistan. (Tr. 31-34, 71, CX-3, p. 40, CX-8, CX-9, p. 44, 45, CX-13; Ex-21).2 Claimant described his prior employment as physical work requiring kneeling, crawling and climbing which he is currently unable to do due to pain in the right knee and ankle. (Tr. 61-63).3

While working in Kandahar, Claimant earned $28,322.09 living in a tent on a military base. (Tr. 35, 36, CX-4 p. 3, CX-10, p. 1).4. Before being employed by Employer Claimant took and passed a physical exam with no prior complaints of leg, back, neck or head pain. (Tr. 37). Employer initially assigned Claimant to cleaning a gymnasium followed by bathroom cleaning assignments requiring him to lift hoses, buckets, sweepers weighing up to 70 pounds with frequent crawling, and squatting, and standing. Claimant worked Monday through Friday, 12 hours per day, and on occasion 7 days a week. (Tr. 38-41).

On July 11, 2005, at about 4:00 a.m., while sleeping in a tent, Claimant was attacked by rocket propelled grenades. (RPGs). The force of the blast knocked him face first on the ground. Claimant was taken for medical treatment to the base hospital and then to Landstul Regional Medical Center where he remained from July 11 to July 20, 2005 during which time he was treated for an open wound to

2 Claimant currently studies English and hopes to eventually become a realtor. (Tr. 67).

3 The DOT describes construction work as heavy work requiring frequent stooping, kneeling, and crouching and occasional balancing. Janitor is described as medium work with occasional balancing, stooping, kneeling, and crouching. (CX-46, CX-47, CX-48, CX-49, CX-50).

4 Although Employer disputes the amount of compensation it paid to Claimant in 2005, Claimant's income tax records for that year show Claimant reporting income of $28,322.00. (CX-3, pp. 37, 39).

the right leg, open right tibial fibula shaft fracture, and right tibial nerve contusion caused by shrapnel from the RPG attack. (CX-23; EX-20). From Landstul Claimant was transferred to Houston where he underwent a series of surgeries performed by Drs. Kaldsis, Melissimos, and Jarolimek on his right leg. (Tr. 44, 45, EX-3, CX-23, CX-24, CX-35, CX-39, CX-42).5 On December 7, 2005, Dr. Jarolimek operated on Claimant performing an explanation percutaneous interosseum pins, and intermedullary rodding right tibia. (CX-15, p. 4).

While under the care of Drs. Kaldsis, Melissimon and Jarolimek, Claimant told them he suffered from jaw as well as leg pain. (Tr. 48). From July 11 to July 21, 2005 Claimant was on morphine followed by "strong pills for pain." Dr. Jarolimek operated on Claimant on December 7, 2005 and May 10, 2006, during which he removed a bridge, installed a rod from the knee to the ankle and removed screws that were causing severe pain when Claimant walked. (Tr. 49, 50).6 Claimant last saw Dr. Jarolimek on August 2, 2006 on which visit Dr. Jarolimek told Claimant not to carry too much weight, avoid running to prevent fractures (Tr.51, 52). In Kandahar Claimant was required to run to bunkers when attacked by RPGs.

Besides not being able to run, Claimant has difficulty kneeling and limited such to two occasions when undergoing an FCE on January 11, 2007. (Tr. 53). During this FCE Claimant experienced severe pain and swelling in the right lower extremity which prevented him from completing the walking portion of the evaluation. (Tr. 54, 63). Claimant also had difficulty balancing, and currently cannot run, or stand for long periods. (Tr. 64, 65). In addition his TMG condition has caused severe headaches, which prevents him from doing his past work. (Tr. 66). The TMJ and leg problem interfere with Claimant's ability to sleep and work due to severe pain. (Tr. 74).

On January 11, 2007, Claimant underwent an FCE at TIRR Rehabilitation. The evaluator, Kate Hughes, was not provided a written description of Claimant's laborer position. Ms. Hughes found Claimant to be cooperative putting forth reliable effort and assessed Claimant capable of performing medium duty with restrictions or limiting factors of squatting, kneeling (unable to kneel on right knee) strength, balance, range of motion in right ankles and pain in right leg, neck and TMJ. Claimant's right leg was slightly longer than the left causing Claimant to pronate his right foot with standing and walking increasing stress of anterior tibial

5 Claimant incurred $34,361.45 in medical expenses while hospitalized at Landstuhl. (CX-16, p. 2).
6 Claimant saw Dr. Jarolimek on August 24, October 10, November 30, December 7, 12, 28, 2005; February 7, 2006.

tendon and 1st met. head. Claimant had right leg weakness, significant atrophy and did not equally bear weight when lifting and squatting. In addition, Claimant report pain in TMJ and neck areas with soft tissue restrictions in neck and jaw area that may require physical therapy after clearance by a physician. (CX-37).

On April 11, 2007, Claimant saw Dr. Weiner at Employer's request for about 15 minutes and according to Claimant was at the same functional level as when he took the 2007 FCE. During Dr. Weiner's examination, Dr. Weiner told Claimant nothing further could be done for his right leg except to undergo plastic surgery to fill in a hole at the injury site. Claimant desires this operation, but as of the present has not undergone such treatment. (Tr. 55-58). In a report dated April 2, 2007, Dr. Varner opined that Claimant was status post-blast injury with open right tibia fracture and medial soft tissue defect now healed with residual stiffness and soreness and cosmetic issues associated with a soft tissue defect. Dr. Varner noted that Claimant's restrictions should be based on pain and discomfort with Claimant lacking dorsiflexion of the ankle. (CX-28, EX-23).

On April 24, 2007, dentist Dr. Ronald W. Konig issued a report after examining Claimant in which he stated Claimant had a TMJ problem requiring further Clinical diagnosis with computerized scans including electromyography, electrosonography, and electronic jaw tracking and tomograms with possible use of an orthotic to reposition the jaw. (CX-30).

On June 13, 2007, Claimant was evaluated for TMJ by Dr. Mike Morris at Employer's request. On examination, Dr. Morris elicited moderate pain upon palpation of the right middle temporalis, left anterior temporalis, right auricular region, lateral temporomandibular capsule bilaterally, superficial masseter bilaterally, and anterior digastrics bilaterally, severe pain was elicited upon manual palpation of the left middle temporalis, left pre-auricular region, left mylohyoid, lateral pterygoid bilaterally and posterior digastrics bilaterally. Upon reviewing diagnostic records including electromyographic studies of muscle activity and photographic documentation, Dr. Morris found Claimant's TMJ disorder to be related to Claimant's July 15, 2005 injury where he landed face first on a plywood floor which injury was documented in physician notes as early as the first month following the attack. Dr. Morris stated that considering the extent of the leg injury it was reasonable for the jaw joint injury to take a "back seat" to the more serious leg injury. However, as the months went by, the TMJ injury became more important. Claimant's jaw pain was moreover consistent with the injury as described by Claimant and reflected in the treating physician notes. (CX-53).

Claimant has received treatment for TMJ which Employer/Carrier has refused to pay. (Tr. 59). Employer has paid Claimant temporary total disability compensation based on an AWW of $580.00 at a compensation rate of $386.87 from July 17, 2005 through January 24, 2007 for a total of $30,834.00. (CX-3, pp. 13, 16; EX-14, EX-15).

B. Request for Medical Care

On August 24, 2005, Claimant was seen by Dr. Jarolimek who recommended Claimant be seen by a TMJ specialist for jaw pain. (CX-15, p. 3). On an office visit of February 7, 2006, Dr. Jarolimek recommended conservative care for TMJ pain. (CX-15, p. 5). On April 2 and 13, 2007, Claimant by letter, request Employer provide medical care for TMJ by Dr. Konig. (CX-15, pp. 1, 7). On the same date, Claimant requested pursuant to Section 7 of the Act, payment of additional medical expenses by Carrier which expenses had already been paid for by Claimant's personal insurance carrier. (CX-15, p. 10, CX-16-22). Employer declined to provide TMJ care and Claimant in turn filed an LS-18 requesting a hearing. (CX-15, p. 8).

C. Employer Exhibits

Employer submitted a payroll statement showing payment of $22,620.45 to Claimant for the period of January 26, 2005 to June, 2005. (EX-1) This was in contrast to a more detailed report of Employer showing payment of $28,322.09 for calendar year 2005, plus Claimant's tax return for 2005 showing wages of $28,322.00. (CX-10, EX-13).

Employer also submitted Claimant's pre-employment physical (EX-2); medical records from Landstuhl Regional Medical Center showing treatment for fracture of right fibula, open wound to right lower leg, injury to posterior tibial artery (EX-3); treatment at Vista Medical Center Hospital from May 10-16, 2006 showing removal of hardware; surgery on December 7, 2005 for intramedullary rodding of right tibia (EX-5); treating records of Dr. Jarolimek from August 24, 2005 when Claimant complained of jaw pain to August 2, 2006 (EX-6); Methodist Hospital records from July 21, 2005 showing irrigation and debridement of tibial fracture site (EX-7); San Jacinto Aquatic Therapy records from September 20 to October 5, 2005 (EX-8); treating medical records from Drs. Kaldis and Melissinos from August 8-10, 2005 (EX-9, EX-10); x-ray report from Vista Medical Center

dated December 7, 2005 (EX-11); nursing records from July 30, 2005 to August 21, 2005. (EX-12).

On April 19, 2007, Rehabilitation Counselor, William A. Stanfield, submitted a preliminary rehabilitation report on Claimant in which he concluded, based upon his review of the medical record, that Claimant as of April 11, 2005 had reached maximum medical improvement from his leg injury and was released by Dr. Weiner to unrestricted work activity. As of that date Claimant's TMJ status was unknown, but Mr. Stanfield concluded such a condition did not usually result in any significant or permanent work restrictions. Mr. Stanfield concluded that Claimant appeared capable of returning to work in his prior occupation as a construction worker with no loss in earning capacity with the ability to make up to $29,659. Mr. Stanfield described Claimant's past construction work as customarily involving heavy physical exertion and noted that Claimant's FCE had limited him to only medium work. (EX-22).

DISCUSSION

A. Contention of the Parties

Claimant contends that: **(1)** he has reached MMI for the right leg injury from an orthopedic aspect, but still needs plastic surgery to the right lower extremity in the form of tissue supplementation and TMJ treatment, and thus, has not reached overall MMI resulting in temporary disability; **(2)** he is entitled to total disability in that he cannot perform his past work because of an inability to run, crawl, kneel or walk for prolonged periods of time; **(3)** he cannot perform any other type of work due to a TMJ injury which causes severe jaw pain, headaches, and insomnia; **(4)** he is entitled to TMJ treatment by Dr. Konig; **(5)** Employer has not shown suitable alternative employment, in that the labor market survey of Mr. Stanfill failed to consider Claimant's language difficulties, and limitations on running, crawling, kneeling and walking, and failed to specify the specific details on any alternative work; **(6)** his AWW should be determined under 10© of the Act since Claimant did not work substantially the whole of the year prior to injury and there is no evidence of wages of comparable employees with utilization gross earnings in 2005 of $28,322.09 resulting in an AWW of $1,119.74 citing; *Zimmerman v. Service Employers Intl. Inc.,* BRB No 05-0580 (Feb 22. 2006) and *Proffit v. Service Employers International, Inc.,* BRB 06-0306 (Aug. 14, 2006) *or* a blended approach using Claimant's overseas earnings with stateside earnings of $400.00

per week from scaffold builder, janitor, painter citing, *Walker v. Washington Metro. Area Transit Authority* , 793 F.2d 319,322 (D.C. Cir. 1986, cert .denied 479 U.S. 1094 (1987); *Empire United r v. Gatlin*, 936 F.2d 819, 822 (5th Cir, 1991; *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980); and **(7)** he is entitled to TMJ medical care under Section 7 as confirmed by Drs. Konig and Morris.

On the other hand Employer disputes causation for the TMJ disorder contending Claimant failed to establish even a *prima facie* case or if established Employer rebutted by Claimant's admission that he did not report such until more than six weeks later on August 24, 2005 to Dr. Jarolimek. Employer further asserts: **(1)** Claimant failed to establish disability for the TMJ disorder in that such a disorder has nothing to do with Claimant's ability to lift, carry, or perform other construction; **(2)** Claimant failed to introduce any medical reports showing TMJ producing any disabling symptoms; **(3)** vocational expert Stanfill showed Claimant having the wage earning capacity of a construction worker in Houston, Texas of $24,286.00 to $29,659.00 with Claimant at MMI either on April 10, 2007 per Dr. Weiner or May 17, 2007 per Dr. Varner; **(4)** Claimant's AWW should be based on his earnings from July 11, 2004 to July 11, 2005 amounting to $22,620.45 divided by 52=$435.01 with a corresponding compensation rate of $290.01 with Employer entitled to a credit for overpayment; **(5)** Claimant is not entitled to additional benefits because the only work related injury he sustained was to the right leg which has resolved without need of further medical treatment.

B. Credibility of Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc., v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

In this case I was impressed with Claimant's demeanor, and truthfulness concerning his injuries and limitations finding such testimony to be consistent with the overall treatment records and thus creditable. While Employer is correct in noting an approximate 6 week delay in reporting TMJ symptoms, I agree with Dr. Morris' evaluation finding such a delay to be understandable considering the severity of the leg injury which consumed most if not all of Claimant's initial medical treatment.

C. Causation

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. The mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer. *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608, 615, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer and a *prima facie* case must be established before a claimant can take advantage of the presumption). Once both elements of the *prima facie* case are established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d 287-88.

In order to show harm or injury a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D.C.Cir. 1968); *Southern Stevedoring Corp., v. Henderson*, 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode, and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. *Adkins v. Safeway Stores*,

Inc., 6 BRBS 513, 517 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998) (pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995) (pre-existing back injuries).

Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions that could conceivably cause the harm alleged beyond a mere fancy or wisp of what might have been. *Wheatley v. Adler*, 407 F.2d 307, 313 (D.C. Cir. 1968). A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990) (finding a causal link despite the lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980) (same). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or that conditions existed at work that could have caused the harm. *Bonin v. Thames Valley Steel Corp.*, 173 F.3d 843 (2nd Cir. 1999) (unpub.) (upholding ALJ ruling that the claimant did not produce credible evidence that a condition existed at work which could have cause his depression); *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15(1976)(finding the claimant's uncorroborated testimony on causation not worthy of belief); *Smith v. Cooper Stevedoring Co.*, 17 BRBS 721, 727 (1985) (ALJ) (finding that the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record).

For a traumatic injury case, the claimant need only show conditions existed at work that could have caused the injury. Unlike occupational diseases, which require a harm particular to the employment, *Leblanc v. Cooper/T. Stevedoring, Inc.*, 130 F.3d 157, 160-61 (5th Cir. 1997) (finding that back injuries due to repetitive lifting, bending and climbing ladders are not peculiar to employment and are not treated as occupational diseases); *Gencarelle v. General Dynamics Corp.*, 892 F.2d 173, 177-78 (2nd Cir. 1989) (finding that a knee injury due to repetitive bending stooping, squatting and climbing is not an occupational disease), a traumatic injury case may be based on job duties that merely require lifting and moving heavy materials. *Quinones v. H.B. Zachery, Inc.*, 32 BRBS 6, 7 (2000), *aff'd on other grounds*, 206 F.3d 474 (5th Cir. 2000). A claimant's failure to show

an antecedent event will prohibit the claimant from establishing a *prima facie* case and his entitlement to the Section 20 presumption of causation.

In the present case Employer disputes only the TMJ injury claiming Claimant failed to establish either a *prima facie* case or if he did Employer rebutted such. Based upon the record evidence including the reports of Drs. Konig and Morris, I am convinced Claimant established not only a *prima facie* case, but adequately explained his delay in reporting TMJ symptoms Employer did not rebut the *prima facie* case and even if they did Claimant showed by the overall evidence submitted that the TMJ disorder was due to the RPG attack causing him to be knocked out of bed and land on his face.

D. Nature and Extent of Injury

Disability under the Act is defined as an incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment. 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement. (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981). In this case, Claimant has reached MMI

for the leg injury, but has not reached MMI for the TMJ condition. Thus, his disability remains temporary in nature.

The Act does not provide standards to distinguish between classifications or degrees of disability. However, case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner***,** 661 F.2d at 1038; *P&M Crane Co., v. Hayes*, 930 F.2d at 429-30; *SGS Control Serv., v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). Claimant need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984) (emphasis added). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). In this case Claimant credibly testified that his leg injury prevented him from doing either the kneeling and/or crawling required in his janitorial Afghanistan job or prior employment. Thus, his condition remains total in extent.

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). Total disability becomes partial on the earliest date on which the employer establishes suitable alternative employment. *SGS Control Serv.*, 86 F.3d at 444; *Palombo v. Director, OWCP*, 937 F.2d 70, 73 (D.C. Cir. 1991); *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). A finding of disability may be established based on a claimant's credible subjective testimony. *Director, OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 194 (5th Cir. 1999) (crediting employee reports of pain); *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 944-45 (5th Cir. 1991) (crediting employee statement that he would have constant pain in performing another job). An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540, 542-43 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984).

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions: (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

Turner, 661 F.2d at 1042-43 (footnotes omitted).

When an employer presents several different jobs that are available to a claimant, or when a claimant has worked several different jobs, it is appropriate to average the earnings to arrive at a fair and reasonable estimate of the claimant's earning potential. *Avondale Industries, Inc., v. Pulliam*, 137 F3d. 326, 328 (5th Cir. 1998)(finding that averaging several jobs offered by an employer was appropriate because the court has no way of determining which job the claimant will obtain and the average wage reflects all those jobs that are available); *Shell Offshore Inc., v. Cafiero,* 122 F.2d 312, 318 (5th Cir. 1997)(holding that averaging was a reasonable method to calculate a claimant's post-injury earning capacity); *Louisiana Insurance Guaranty. Ass'n v. Abbott*, 40 F.3d 122, 129 (5th Cir.1994)(finding that averaging salary figures to establish earning capacity was appropriate and reasonable).

In this case I am convinced Claimant due to his leg restriction and TMJ complaints of severe pain cannot perform either his past work or any other suitable employment, and thus, is totally disabled.

E. Average Weekly Wage

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then

divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 407 (5th Cir. 2000), *on reh'g* 237 F.2d 409 (5th Cir. 2000). Where neither Section 10(a) not Section 10(b) can be "reasonably and fairly applied," Section 10(c) is a catch all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c); *Louisiana Insurance Guaranty Assoc. v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998). For traumatic injury cases, the appropriate time for determining an injured workers average weekly wage earning capacity is the time in which the event occurred that caused the injury and not the time that the injury manifested itself. *Leblanc v. Cooper/T. Smith Stevedoring, Inc.*, 130 F.3d 157, 161 (5th Cir. 1997); *Deewert v. Stevedoring Services of America*, 272 F.3d 1241, 1246 (9th Cir. 2001) (finding no support for the proposition that the time of the injury is when an employee stops working); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, 172 (1998). In occupational disease cases, the appropriate time for determining an injured workers average weekly wage earning capacity is when the worker becomes aware, or should have been aware, of the relationship between the employment, the disease, and the death or disability. 33 U.S.C. § 910(i).

Section 10(a) focuses on the actual wages earned by the injured worker and is applicable if the claimant has worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury. 33 U.S.C. § 910(a); *see also Ingalls Shipbuilding, Inc., v. Wooley*, 204 F.3d 616, 618 (5th Cir. 2000)(stating Section 10(a) is a theoretical approximation of what a claimant could have expected to earned in the year prior to the injury); *Duncan v. Washington Metro. Area Transit Authority*, 24 BRBS 133, 135-36 (1990). Once a determination is made that the injured employee worked substantially the whole year, his average weekly earnings consists of "three hundred times the average daily wage or salary for a six-a-day worker and two-hundred and sixty times the average daily wage of salary for a five day worker. 33 U.S.C. § 910(a). If this mechanical formula distorts the claimant's average annual earning capacity it must be disregarded. *New Thoughts Fishing Co., v. Chilton*, 118 F.2d 1028, n.3 (5th Cir. 1997); *Universal Maritime Service Corp., v. Wright*, 155 F.3d 311, 327 (4th Cir. 1998). In this case Section 10(a) is not applicable because Claimant did not work a substantial portion of the year prior to injury.

Where Section 10(a) is inapplicable, the application of Section 10(b) must be explored prior to the application of Section 10(c). 33 U.S.C. § 910(c); *Bunol*, 211 F.3d at 297; *Wilson*, 32 BRBS at 64. Section 10(b) applies to an injured

employee who has not worked substantially the whole year, and an employee of the same class is available for comparison who has worked substantially the whole of the preceding year in the same or a neighboring place. 33 U.S.C. § 910(b). If a similar employee is available for comparison, then the average annual earnings of the injured employee consists of three hundred times the average daily wage for a six day worker, and two hundred and sixty times the average daily wage of a five day worker. *Id*. To invoke the provisions of his section, the parties must submit evidence of similarly situated employees. *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1031 (5th Cir. 1998). When the injured employee's work is intermittent or discontinuous, or where otherwise harsh results would follow, Section 10(b) should not be applied. *Id*. at 130; *Empire United Stevedores v. Gatlin,* 936 F.2d 819, 822 (5th Cir. 1991). In this case there is no evidence of any earnings from any similarly situated employee making Section 10 (b) inapplicable.

If neither of the previously discussed sections can be applied reasonably and fairly, then a determination of a claimant's average annual earnings pursuant to Section 10(c) is appropriate. 33 U.S.C. § 910(c); *Bunol*, 211 F.3d at 297-98; *Gatlin*, 936 F.2d at 821-22; *Browder v. Dillingham Ship Repair*, 24 BRBS 216, 218-19 (1991). Section 910(c) provides:

> [S]uch average annual earnings shall be such sum as, having regard to the previous earnings of the injured employee in the employment in which he was working at the time of the injury, and of other employees of the same or most similar class working in the same or most similar employment in the same or neighboring locality, or other employment of such employee, including the reasonable value of services of the employee if engaged in self-employment, shall reasonably represent the annual earning capacity of the injured employee.

The judge has broad discretion in determining the annual earning capacity under Section 10(c). *James J. Flanagan Stevedores, Inc., v. Gallagher*, 219 F.3d 426 (5th Cir. 2000)(finding actions of ALJ in the context of Section 10(c) harmless in light of the discretion afforded to the ALJ); *Bunol*, 211 F.3d at 297 (stating that a litigant needs to show more than alternative methods in challenging an ALJ's determination of wage earning capacity); *Hall*, 139 F.3d at 1031 (stating that an ALJ is entitled to deference and as long as his selection of conflicting inferences is based on substantial evidence and not inconsistent with the law); *Wayland v. Moore Dry Dock*, 25 BRBS 53, 59 (1991). The prime objective of Section 10(c) is

to arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury. *Gatlin*, 936 F.2d at 823; *Cummins v. Todd Shipyards*, 12 BRBS 283, 285 (1980). The amount actually earned by the claimant is not controlling with earning capacity defined as the amount of earnings that a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980).

Claimant contends his AWW should be calculated based upon his gross earnings while in Afghanistan, ($28,322.09) divided by the number of days he was overseas, (176) resulting in $160.92 per day multiplied by 167 days of actual work=$26,873.80 divided by 24 weeks=an AWW of $1,119.74 with a compensation rate of $746.49. Alternatively Claimant suggests a blended rate using Claimant's actual overseas earnings, plus his average weekly earnings of $400.00 stateside when he worked as a scaffold builder, janitor, painter and laborer. Employer on the other hand would based his compensation on Claimant's total earnings from July 11, 2004 to July 11, 2005 ($22,620 divided by 52 = an AWW of $435.01 with a compensation rate of $290.01.

In trying to determine an appropriate AWW, I find Employer' s method unfairly penalizes Claimant for being unable to find work from May, 2004, through January 26, 2005 when hired by Employer. On the other hand, Claimant's use of only overseas earnings tends to unduly inflate Claimant's earning potential. I find that a more appropriate method is to use a blended rate taking into consideration what Claimant earned from 2003 to the date of injury (2003-$26,582; 2004-$3,733.00; 2005-$28,322.95=$58,637.95) divided by the number of weeks worked (2003-52 weeks; 2004-17 weeks; 2005-23.5 weeks=92.5weeks) which equals $633.92 for an AWW with a corresponding compensation rate of $422.62.

F. Medical Benefits

Section 7(a) of the Act provides that the employer shall furnish such medical, surgical, and other attendance or treatment for such period as the nature of the injury or the process of recovery may require. 33 U.S.C. Section 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a prima facie case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989);

Pirozzi v. Todd Shipyards Corp., 21 BRBS 294, 296 (1988); *Turner v. The Chesapeake and Potomac Telephone Co.*, 16 BRBS 255, 257-58 (1984). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988); *Barbour v. Woodward & Lothrop, Inc.*, 16 BRBS 300 (1984). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975)(stating that any question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. *Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 36 (1989); *Mayfield v. Atlantic & Gulf Stevedores*, 16 BRBS 228 (1984); *Dean v. Marine Terminals Corp.*, 7 BRBS 234 (1977).

In this case Claimant needs additional plastic surgery on the right leg as noted by Drs. Weiner and Varner, and TMJ treatment as noted by Drs. Konig and Morris which include electromyography, electrosonography, and electronic jaw tracking and tomograms with possible use of an orthotic to reposition the jaw. (CX-30).

H. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

I. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from July 10, 2005 and continuing based on an average weekly wage of $633.92, and a corresponding compensation rate of $422.62.

2. Employer shall be entitled to a credit for all compensation paid to Claimant for his July 10, 2005 leg injury.

3. Employer shall pay Claimant for all future reasonable medical care and treatment arising out of his July 10, 2005 work related right leg and TMJ injuries pursuant to Section 7(a) of the Act, including plastic surgery for the right leg by Dr. Melissinos and TMJ treatment by Dr. Konig, including electromyography, electrosonography, and electronic jaw tracking and tomograms with possible use of an orthotic to reposition the jaw. (CX-30).

4. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. Section 1961.

5. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge